

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation into the Gas Market Activities of Southern California Gas Company, San Diego Gas and Electric, Southwest Gas, Pacific Gas and Electric, and Southern California Edison and their impact on the Gas Price Spikes experienced at the California Border from March 2000 through May 2001.

Investigation 02-11-040
(Filed November 21, 2002)

**ADMINISTRATIVE LAW JUDGE'S RULING
GRANTING IN PART AND DENYING IN PART
MOTION FOR ORDER COMPELLING
PRODUCTION OF DOCUMENTS**

Continuing the many discovery disputes in this proceeding, Southern California Edison Company (SCE) has moved for an order compelling Sempra Energy Corporation (Sempra Energy) to produce deposition transcripts and other documents. (Motion of June 24, 2005, corrected by errata filed July 1, 2005.) Sempra Energy filed its response on July 7, 2005. I grant portions of the motion and deny others.

SCE served a subpoena duces tecum, issued February 1, 2005, on Sempra Energy's custodian of records. The subpoena included ten questions setting forth document requests. SCE's pending motion seeks an order requiring the production of three categories of documents responsive to Questions 1 to 3 of the subpoena:

1. The transcripts and exhibits for all depositions of Sempra Energy employees taken by the plaintiffs in litigation often

referred to as “the San Diego Cases” (referred to in earlier rulings as the “Antitrust Cases”).

2. All documents (including e-mails) that discuss or refer to Affiliate Transaction Compliance Notices posted on the SoCalGas and/or SDG&E websites from April 1, 1998, to the present.
3. All documents (including e-mails) created from April 1, 1998, to the present that discuss whether information should be posted on the SoCalGas and/or SDG&E websites or electronic bulletin boards as an Affiliate Transaction Compliance Notice, or as a similar public notice.

SCE argues that its requests are material and relevant to Issue No. 2 in the Scoping Memo for this proceeding, which asks whether Sempra Energy “play[ed] a role in causing the increases in [gas] border prices.” SCE also argues that Sempra Energy promised to provide these documents, regardless of whether they are relevant or material.

While Sempra Energy voiced other objections in earlier communications with SCE, it now justifies its refusal to respond to this portion of subpoena because SCE has not identified with particularity the categories of requested documents to ensure their relevance to the Commission’s investigation. Additionally, Sempra Energy says that SCE has misconstrued the promise to provide documents in response to discovery requests. I first address this issue of a promise to provide the documents in question. I then take up the other issues framed by this discovery stand-off.

Sempra Energy’s Promise to Provide Documents

During a previous discovery dispute between the parties, Javade Chaudhri, Sempra Energy’s Executive Vice President and General Counsel, wrote Assigned Commissioner Geoffrey F. Brown on April 29, 2005, and

promised to provide SCE “with all materials responsive to its recently served fourth subpoena as soon as possible.” Chaudhri also represented, “To be clear, we intend to provide Edison with all materials responsive to its requests, regardless of their materiality or relevance to the matters being investigated in this proceeding” SCE argues that this promise is enforceable under Rule 59.1, “The Commission will honor and enforce parties’ agreements on the . . . production of documents . . . to the same extent as subpoenas and subpoenas duces tecum.” SCE could also have pointed to Rule 1, which admonishes any person who transacts business with the Commission “never to mislead the Commission or its staff by an artifice or false statement of fact or law.”

For its part, Sempra Energy argues that Chaudhri only promised to provide information responsive to the October 19, 2004, subpoena and that he did not make an open-ended promise to provide documents in the future, regardless of their relevance or materiality to this proceeding. The letter, however, could reasonably be read to have included such a promise as Chaudhri indicates that Sempra Energy’s cooperation in discovery would help the Commission complete its investigation “expeditiously and this matter [be] put to rest.”

Ultimately, there is too much uncertainty as to whether Chaudhri was promising information in response to the October 19th subpoena or making a more expansive promise of information. While Rules 1 and 59.1 would be available to enforce a more explicit promise or representation, Chaudhri’s letter is too ambiguous to conclude that it was a promise to provide the type of documents requested by Questions 1 to 3 in the February 1st subpoena.

Deposition Transcripts in San Diego Cases

SCE seeks the transcripts and exhibits pertaining to depositions of Sempra Energy employees taken in the San Diego Cases. I have previously discussed the provisions of the Commission's Rules and the Code of Civil Procedure that are applicable to such requests. (*See* ALJ Ruling Denying Motion to Compel Discovery at 3 (Oct. 4, 2004).) Once again, SCE has failed to satisfy these requirements. While SCE indicates that these depositions will provide information pertaining to certain Scoping Memo issues, SCE's affidavit in support of its subpoena provides too little description about the San Diego Cases to convince me that material and relevant information may reasonably be found. SCE assumes an understanding of the San Diego Cases that does not appear in this record. Other than a general statement that "Plaintiffs in the San Diego Cases have raised claims against Sempra Energy and its subsidiaries that, in part, allege that Sempra Energy and its subsidiaries did play such a role [in causing border price increases]," SCE's affidavit does not discuss the causes of action set forth in that litigation or how the issues may have been framed by the court's pretrial orders; identify the Sempra Energy witnesses who have been deposed; or more specifically indicate the types of information SCE seeks from the depositions.

SCE's subpoena is not the only available avenue for obtaining these depositions. In a superior court action like the San Diego Cases, Code of Civil Procedure § 2025.5 allows any person to obtain a copy of a deposition transcript from the reporter upon payment of a reasonable charge. The section also provides a procedure for a party to the litigation to seek a protective order.

Documents Affiliate Transaction Compliance Notices

Questions 2 and 3 ask for documents referring to Affiliate Transaction Compliance Notices posted on the SoCalGas and/or SDG&E web sites from April 1, 1998, to the present. SCE indicates that this information will help the Commission understand whether SoCalGas's parent and affiliates improperly shared non-public information. Sempra Energy, while objecting to an information request that extends four years beyond the Subject Period, indicates that it is "willing to produce all affiliate compliance notices that relate to the sharing of information from April 1, 1998 through the end of the Subject Period." (Sempra Energy Response at 3.)

SCE's requests are overly broad in that they potentially encompass documents that were created after the Subject Period and may have nothing at all to do with border pricing during the Subject Period. Conceivably, SCE could justify a subpoena that included post-Subject Period communications among the Sempra entities where the subject matter was limited to Subject Period pricing; but the February 1st subpoena is not so limited.

Otherwise, SCE has justified its need for this type of information. I will enforce the subpoena to the extent that it pertains to the sharing of information from April 1, 1998, through the end of the Subject Period.

IT IS, THEREFORE, RULED that:

1. Southern California Edison's (SCE's) Motion for an Order Compelling Sempra Energy to Produce Documents (June 24, 2005) is DENIED to the extent that it seeks deposition transcripts from the San Diego Cases (Question 1).
2. SCE's Motion is DENIED to the extent that it seeks documents that discuss or refer to Affiliate Transaction Compliance Notices posted on the SoCalGas and/or SDG&E websites from April 1, 1998, to the present. SCE's Motion,

however, is GRANTED to the extent that it seeks these documents for the period of April 1, 1998, through the end of the Subject Period, as that period has previously been defined in this proceeding.

3. SCE's Motion is DENIED to the extent that it seeks documents (including e-mails) created from April 1, 1998, to the present that discuss whether information should be posted on the SoCalGas and/or SDG&E websites or electronic bulletin boards as an Affiliate Transaction Compliance Notice, or as a similar public notice. SCE's Motion, however, is GRANTED to the extent that it seeks these documents for the period of April 1, 1998, through the end of the Subject Period, as that period has previously been defined in this proceeding.

Dated July 29, 2005, at San Francisco, California.

/s/ John E. Thorson

John E. Thorson
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of Administrative Law Judge's Ruling Granting In Part and Denying In Part Motion for Order Compelling Production of Documents by using the following service:

☐ E-Mail Service: sending the entire document as an attachment to all known parties of record who have provided electronic mail addresses.

☒ U.S. Mail Service: mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Dated July 29, 2005, at San Francisco, California.

/s/ Antonina V. Swansen

Antonina V. Swansen

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.